Supreme Court, U.S.
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92-1140
CASE No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

DONALD R. BROWNING and
NANCY C. BROWNING - PETITIONERS

vs.

BOATMEN'S BANK OF BENTON - RESPONDENT

MICHAEL LEWIS BROWNING, individually
and as trustee; BARBARA JANE WARD;
and MARY SUSAN BENNETT, - Defendants

PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth District Appellate Court of Illinois violate the right to due process of Petitioners, under the Constitution of the State of Illinois and the Constitution of the United States after its ORDER of April 13, 1990, in which it denied a Motion to Dismiss Appeal, based on lack of jurisdiction , which had been filed by Boatmen's Bank of Benton, based upon its prior Opinion in Leckrone v. City of Salem, 152 Ill. App.3d. 126., and then **(19) months later** , on February 3, 1992, and on the Court's own motion, by the Fifth District Appellate Court's ORDER dismissing the appeal for lack of jurisdiction based upon it's prior decision in Leckrone?

2. Can documents, concerning a complaint which had been filed with the Illinois Attorney Registration and Disciplinary Commission, be submitted to the

Trial Court, privately and "ex parte" by one party with the intent of impeaching the position of the other party, and prior to a judgment of the Trial Court?

3. Can documents, concerning a complaint filed with the Illinois Attorney Registration and Disciplinary Commission, which by Illinois law (Illinois Supreme Court Rule 766, Ill.Rev.Stat. 110A, Sec.766.) are private and confidential, be submitted to the Trial Court at any time?

4. Does the disclosure of such documents, which by law are private and confidential, violate the right to privacy as guaranteed by the Constitution of the United States, the Constitution of Illinois and the law of Illinois?

5. Do the Trial Courts and the Reviewing Courts of Illinois have an obligation and a duty under Illinois Law to take or initiate disciplinary measures

pursuant to a violation of the Code of Professional Ethics of the Illinois Supreme Court, Code of Civil Procedure Chapter 110A, Section 1, 102.? (Illinois Supreme Court Rule 1-102).

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Amendments V and XIV (1) to the United States Constituion.

Constitution of State of Illinois, Article 1, Section 12 which states:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

Illinois Code of Civil Procedure, Ill. Rev. Stat. Chap. 110A, Section 766, (a)., Illinois Supreme Court Rule 766 (a)., REGISTRATION AND DISCIPLINE OF ATTORNEYS:

> Confidentiality and privacy
> (A) Public proceedings, proceedings under Rule 751 through 774 shall be public with the exceptions of the following matters, which shall be private and confidential:
> (1) Investigations conducted by the administrator;
> (2) proceedings before the Inquiry Board;

(3) proceedings pursuant to rule 753 before the Hearing Board prior to the service of a complaint upon the respondent;

Illinois Code of Civil Procedure Chapter 110A Section 63, B. (3)., Illinois Supreme Court Rule 63 B. (3) CANON 3 states:

> A judge having knowledge of a violation of these canons on the part of a judge or a violation of Rule 1-102 of the Code of professional Responsibility on the on the part of a lawyer shall take or initiate appropriate disciplinary measures.

Illinois Code of Civil Procedure Chapter 110A, Section 63, A. (4). Supreme Court Rule 63 A. (4), CANON 3 states:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, shall not permit "ex parte" or other communications concerning a pending or impending proceeding.

CASE NO. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

Petitioners, DONALD R. BROWNING and NANCY C. BROWNING, (hereinafter, Brownings) respectfully pray that a writ of certiorari issue to review the ORDERS BELOW and particularly the judgment and ORDER of the Fifth District Appellate Court, dismissing on its own motion, this instant appeal for lack of jurisdiction, after having previously deciding the issue of

jurisdiction and thereinafter retaining jurisdiction over this instant appeal for a period of time exceeding nineteen (19) months. Petitioners, DONALD R. BROWNING and NANCY C. BROWNING, respectfully pray that the writ of certiorari also review the judgment of the Fifth District Appellate Court of Illinois, in not reviewing the judgment of the Trial Court of Franklin County, Illinois, thereby denying to the Brownings, the right of privacy and confidentiality under law and especially as it relates to a complaint filed with the Illinois Attorney Registration and Disciplinary Commission as guaranteed by Illinois law, and the right of the Brownings to a private and confidential relationship with the Illinois Registration and Disciplinary Commission of the Illinois Supreme Court and the constitutional right to privacy, the invasion thereof and the

possible misuse of legal proceedings.

ORDERS BELOW

The ORDER entered on April 13, 1990, by the Fifth District Appellate Court of Illinois, thereby denying Appellee, Boatmen's Bank of Benton's Motion to Dismiss appeal, herein, for lack of jurisdiction, appears in Appendix at page A-2.

The ORDER entered on February 21, 1992, by the Fifth District Appellate Court of Illinois, on the Court's own motion appears in Appendix at page A-3.

The **ORDER** entered on June 3, 1992, by the Supreme Court of Illinois, denying Petitioners, Donald R. Browning and Nancy C. Brownings' Petition for Appeal as a Matter of Right or Leave or Leave to Appeal appears in Appendix at page A-7.

The **ORDER** entered on July 7, 1992, by the Supreme Court of Illinois, denying Petitioners, Donald R. Browning and Nancy C.

Brownings', Motion for Leave to file a Motion for Reconsideration of Denial of the Petition for Appeal as a Matter of Right or Leave to Appeal appears in Appendix at page A-8.

Defendants, Michael Lewis Browning, individually and as Trustee, Barbara Jane Ward, and Mary Susan Browning are not parties to this appeal, but are given notice thereof.

JURISDICTIONAL STATEMENT

The Fifth District Appellate Court's Order dismissing this appeal was entered on February 3, 1992. A timely PETITION FOR APPEAL AS A MATTER OF RIGHT OR LEAVE TO APPEAL was filed with the Illinois Supreme Court on February 3, 1992, which was denied on June 3, 1992. A timely MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION OF DENIAL OF THE PETITION FOR APPEAL AS A MATTER OF RIGHT OR LEAVE TO APPEAL was filed

with the Illinois Supreme Court on June 29, 1992, which was denied on July 7, 1992. A timely APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI was filed with this Court on October 1, 1992 and an ORDER granting a sixty day extension was entered by this Honorable Court on the 7th day October, 1992.

This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS PROVIDED

Amendments V and XIV (1), to the United States Constitution are set forth in Appendix Page A-9.

Constitution of State of Illinois, Article 1, Section 12 which states:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

Stat. Chap. 110A, Sec. 766, (a)., Illinois Supreme Court Rule 766 (a)., REGISTRATION AND DISCIPLINE OF ATTORNEYS:

Confidentiality and privacy

(A) Public proceedings, proceedings under Rule 751 through 774 shall be public with the exceptions of the following matters, which shall be private and confidential:

(1) Investigations conducted by the administrator;
(2) proceedings before the Inquiry Board;
(3) proceedings pursuant to rule 753 before the Hearing Board prior to the service of a complaint upon the respondent;

Illinois Code of Civil Procedure Chapter 110A, Section 63, B. (3), Illinois Supreme Court Rule 63 B. (3) CANON 3 which states:

(3). A judge having knowledge of a violation of these canons on the part of a judge or a violation of Rule 1-102 of the Code of professional Responsibility on the on the part of a lawyer shall take or initiate appropriate disciplinary measures.

Illinois Code of Civil Procedure Chapter 110A, Section 63, A. (4). Supreme Court Rule 63 A.(4), CANON 3 states:

> (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, shall not permit "ex parte" or other communications concerning a pending or impending proceeding.

STATEMENT OF THE CASE

This cause of action was filed on December 16, 1988 in the Second Judicial Circuit, Franklin County, Illinois as Case Number 88-CH-96, by Plaintiff, Boatmen's Bank of Benton by it's attorneys, Hart & Hart, versus Defendants, Donald R. Browning, Nancy C. Browning, Michael Lewis Browning, Barbara Jane Ward and Mary Susan Bennett. On the date of this Petition for a Writ of Certiorari, there has been no trial on the issues which were subject of the complaint. In the Fifth District Appellate Court of

Illinois, the appeal number is Number 5-90-0219, and in the Supreme Court of Illinois, the appeal number is 73284.

The Complaint alleged that Defendants Donald R. Browning and Nancy C. Browning, "Brownings", had been involved in fraudulent conveyance by securing an unsecured promissory note payable by the Campbell's Furniture Partnership to the Maurice L. Campbell Trust at the time that the Brownings were indebted to the Boatmen's Bank of Benton.

The unsecured promissory note had been pledged to the M. L. Campbell Trust during the probate proceeding by a new partnership, Campbell's Furniture, consisting of Donald R. Browning (surviving partner) and Nancy C. Browning (daughter of decedent) in exchange for the deceased 84.15% partnership interest in the W. E. Campbell & Son partnership during the probate proceedings. Maurice L.

Campbell died on May 12, 1976 and Richard O. Hart of the law firm of Hart, Hart & Gulley (now Hart & Hart) handled the probate proceedings, and was the Brownings' attorney from 1955 until 1987.

During pre-trial hearings, the Brownings, on November 14, 1989, filed a Motion to Disqualify Attorney, in which they plead that there was a substantial relationship between the prior probate work of Richard O. Hart and the present cause of action for the Bank in attempting to set aside the security pledged to secure payment of the promissory note to the M. L. Campbell Trust. This motion was denied by the Trial Court at a hearing on November 20, 1989, and by ORDER dated January 8, 1990. The Brownings filed a Motion to Reconsider Motion to Disqualify Attorney on January 2, 1990.

On January 24, 1990 while looking

through the Circuit Court records at the Franklin County Court House, Donald R. Browning discovered that "private and confidential documents" had been submitted to the Trial Court without their knowledge or authorization. The documents consisted of a complaint and related papers that Nancy C. Browning had filed previously with the Illinois Attorney Registration and Disciplinary Commission concerning her concern about the conflict of interest herein of the Bank's attorney, Richard O. Hart.

On February 7, 1990, the Brownings filed an Amended Motion to Reconsider Motion to Disqualify Attorney which motion was also denied, by the Trial Court, on March 12, 1990.

The Amended Motion to Reconsider Motion to Disqualify Attorney brought to the attention of the Trial Court that Defendant,

Donald R. Browning had discovered documents, in the Circuit Court file, which by law were private and confidential, and that the Court had considered these documents prior to the Court's ruling on Defendant's motion to disqualify attorney. That these documents had been filed with the Trial Court unbeknownst to the Brownings and should not have been considered by the Trial Court. These documents, consisting of about fifty-three (53) pages, concerned a complaint, which Nancy C. Browning had filed with the Attorney Registration and Disciplinary Commission of Illinois on February 23, 1989, concerning an ethical conflict in the involvement of attorney Richard O. Hart of the law firm of Hart & Hart, in this instant case.

On April 16, 1990, a NOTICE OF APPEAL was filed with the Fifth District Appellate Court of Illinois, appealing the denial of

the Motion to Disqualify Attorney and the Motion to Reconsider Motion to Disqualify Attorney.

The Fifth District Appellate Court of Illinois affirmed it's jurisdiction in this instant appeal on May 25, 1990 by it's ORDER which states:

> "This cause having been heard on motion of plaintiff-appellee, Boatmen's Bank of Benton, to dismiss appeal for lack of jurisdiction, defendants-appellants, Donald R. Browning et al., objection thereto, and the court being advised in the premises:
>
> IT IS THEREFORE ORDERED that appellee's motion to dismiss for lack of a final and appealable order be, and the same hereby is, DENIED. Leckrone v. City of Salem (5th Dist. 1987), 152 Ill.App.3d 126, 503 N.E.2d 1093.

The Fifth District Appellate Court of Illinois on February 3, 1992, over nineteen (19) months later, and on the Court's own motion, entered it's unpublished ORDER (see Appendix Page A__., for the complete text of the ORDER of February 3, 1992), which ORDER

stated in part: "As an order denying a motion to disqualify an attorney is not final and appealable, this court does not have jurisdiction. We therefore dismiss the appeal". Thusly, changing the law "only" for the Brownings. The Appellate Court did, however, make a conditional finding confirming the Trial Court Judgment in this instant cause of action.

Neither ORDER addressed the fact that along with the Record on Appeal, from the Circuit Court of the Second Judicial Circuit, Franklin County, Illinois, were documents, concerning a complaint and related correspondence, which had previously been filed with the Attorney Registration and Disciplinary Commission of Illinois.

As stated above, these documents had been submitted to the Trial Court, by the Bank's attorney, "ex parte" and prior to the Court's judgment on the Motion To Disqualify

Attorney, which had been filed by Defendants, Donald R. Browning and Nancy C. Browning as a pre-trial motion.

The Attorney Registration and Disciplinary Commission Complaint documents were also the subject of the Amended Motion to Disqualify Attorney, which was also before the Fifth District Appellate Court of Illinois, but also was not addressed by the Fifth District Appellate Court of Illinois.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

I

THE FIFTH DISTRICT APPELLATE COURT OF ILLINOIS ERRED IN DISMISSING THIS INSTANT APPEAL OVER NINETEEN MONTHS AFTER ITS PRIOR ORDER DENYING DISMISSAL OF THE APPEAL

The Fifth District Appellate Court of Illinois erred in dismissing this instant appeal for lack of jurisdiction, on February 3, 1992, over nineteen months (19) after it's earlier Order of May 25, 1990 in which

Plaintiff-Appellee Motion to Dismiss this instant appeal for lack of jurisdiction. The Fifth District Appellate Court of Illinois gave no reason for its reconsideration of its prior Order, nor was there any mention that it did in fact reconsider its earlier Order. The Appellate Court did not state that there was any legal change in the status of the case, nor did they state that they were dismissing this appeal because they had had the benefit of briefs, arguments, and trial records. The Fifth District Appellate Court in an earlier case addressed this issue by ruling: "Appellate Court's denial of motion to dismiss appeal did not preclude subsequent dismissal based upon consideration of briefs, arguments, and trial record" **MT. VERNON GIRL SCOUT COUNCIL v. GIRL SCOUTS OF UNITED STATES,** 53 Ill.App.2d 443, 205

N.E.2d 474),; however that appeal is different from this instant case in that the Fifth District Appellate Court ruled then that they lacked jurisdiction, inasmuch because the appeal was not timely filed. The First District Appellate Court of Illinois had made a similar ruling: "A denial of a motion to dismiss does not preclude a subsequent dismissal on the same grounds suggested in the motion based upon a full consideration of the briefs, arguments of counsel, and the record", (**SCHWIND v. MATTSON**. 17 Ill.App.3d182, 307 N.E.2d 673),; however that appeal is different from this instant appeal in that the reviewing Court dismissed the appeal on the basis that the appeal was moot. In both instances the reviewing Court promptly ruled.

The nineteen (19) month delay by the Fifth District Appellate Court of Illinois

in rendering its decision, in this instant cause of action, has resulted in an undue delay which tends to defeat the prompt administration of justice by the judicial system as mandated by the Constitution of State of Illinois, Article 1, Section 12 which states:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

II

THE FIFTH DISTRICT APPELLATE COURT OF ILLINOIS ERRED IN NOT RULING ON THE PRIVACY ISSUE.

The Fifth District Appellate Court erred in not addressing the privacy issue. It is apparent that the Court had the benefit of the briefs, oral arguments, and the record on appeal, at the time that the Order of February 3, 1992 was issued by the Court

The issue, of the private and confidential documents of the Attorney Registration and Disciplinary Commission which were filed in this instant case, is of such importance that the Appellate Court should have ruled on this issue. The confidentiality and privacy of this issue is provided by law in Illinois Supreme Court Rule 766 (a) (Ill.Rev.Stat. Chap. 110A, Sec. 766, (a), (REGISTRATION AND DISCIPLINE OF ATTORNEYS: Confidentiality and privacy

(A) Public proceedings, proceedings under Rule 751 through 774 shall be public with the exceptions of the following matters, which shall be private and confidential:

(1) Investigations conducted by the administrator;

(2) proceedings before the Inquiry Board;

(3) proceedings pursuant to rule 753 before the Hearing Board prior to the service of a complaint upon the respondent;

(NOTE): NO COMPLAINT WAS SERVED ON RESPONDENT, RICHARD O. HART BY THE HEARING BOARD AS A RESULT OF THE COMPLAINT.

Not only is privacy provided by law to all parties to a complaint, with the Illinois Attorney Registration and Disciplinary Commission of the Illinois Supreme Court pursuant to, Illinois Supreme Court Rule 766, (a), (Ill.Rev.Stat. Chap. 110A, Sec. 766 (a).; but privacy is also provided, to all parties, by the Constitution of the State of Illinois Article 1 Section 12 as cited above. Also privacy is provided by case law, pursuant to the First Appellate Court of Illinois, ruling in **EICK v. PERK DOG FOOD CO,** 347 Ill. App. 293, 106 n.e.2d 742 at 745-748, "Recognition of right to privacy means that law will take cognizance of injury, even though no right of property or contract may be involved and even though damages resulting are exclusively those of mental anguish", and "Constitutional guarantees of

due process in civil cases and of life, liberty, and pursuit of happiness as inherent and inalienable rights protect against invasion of privacy. Illinois Constitution Art. 2 Sec. 19".

This protection of privacy, as provided by law, benefits both the respondent attorney and the person filing the complaint and neither has the right to make it public. Without this protection an attorney could be publicly harassed, and a person filing a complaint would be reluctant to file a complaint as it would subject them to public ridicule, recriminations, as well as vindictiveness and harassment by the respondent attorney as well as attempts to impeach the position of the person, who has filed a complaint, as has been done in this instant case.

The ability of the Illinois Supreme Court to regulate attorneys would be

seriously hampered by the reluctance of the general public to participate and subject themselves to possible abuse by the Courts of Illinois and by the respondent attorney, as well as an an opposing party to separate cause of action. Under no circumstances should either party, or their attorney, have the right to use an Illinois Attorney Registration and Disciplinary Commission Complaint in a court of law for any purpose.

The Illinois Supreme Court ruled in: **THE PEOPLE ex rel. THE ILLINOIS JUDICIAL BOARD v. HARTEL,** 20 Ill.Dec. 592, 38 N.E.2d 801 (1978):

> Although important consideration in adopting constitutional provisions that all proceedings of Judicial Inquiry Board shall be confidential was protection of judges against unfavorable publicity resulting from irresponsible and unfounded charges, other elements, including encouragement and protection of witnesses, must also be evaluated, and thus it cannot be concluded simply because judge under investigation concerning criminal

charges pending against him in a separate criminal proceeding consents to disclosure, that Board's files may automatically be opened to inspection; confidentiality provision must be implemented except as over-riding federal due process compel otherwise.

The Illinois Attorney Registration and Disciplinary Commission is an arm of and controlled by the Supreme Court of Illinois. When an individual desires to file a complaint with the Illinois Attorney Registration and Disciplinary Commission against an attorney, they can contact the Commission. At that time, an prior to filing a complaint against an attorney, the Attorney Registration and Disciplinary Commission sends a brochure with specific instructions to the person wanting to make a complaint against an attorney. The brochure is entitled:; **HOW A COMPLAINT ABOUT A LAWYER IS HANDLED.** This brochu explains exactly what is expected of them,

insured that they will not be involved in the matter unless a formal displinary proceeding is filed against the attorney.

As late as October 19, 1989, Nancy C. Browning sent a letter, to the Illinois Registration and Disciplinary Commission, concerning a newspaper article, which described changes in the Illinois Supreme Court Rules, which, thereby, would make her complaint public, and her concern about the changes in the rules. Nancy C. Browning received a response, to her letter, reaffirming her, that her complaint was private and confidential.

The complete text of that letter to Nancy C. Browning is as follows:

Nancy Browning
Route One
Box 263
Benton, Illinois 62812

Springfield
October 19, 1989

Re: Richard O. Hart
in relation to
Nancy Browning
No. 89-SI-470

Dear Ms. Browning:

Please be advised that your charge is not now considered public. Supreme Court Rule 766 which was amended on October 13, 1989 pertains only to proceedings pending before the Hearing and Review Boards of the Attorney Registration and Disciplinary Commission.

This matter is presently pending before the Inquiry Board of the Attorney Registration and Disciplinary Commission and is confidential. The Matter will only Become public if the Inquiry Board votes that a formal complaint should be filed against Mr. Hart with the Hearing Board.

Very truly yours,

William F. Moran, III
Counsel

The Circuit Court of Franklin County, Illinois, the Fifth District Appellate Court of Illinois and the Supreme Court of Illinois refused to address this issue of invasion of the right of privacy. Does the Appellate Court and the Supreme Court not have a duty to do so?

III

THE FIFTH DISTRICT APPELLATE COURT OF ILLINOIS ERRED IN RULING THAT AN ORDER REFUSING TO STRIKE AN ATTORNEY FROM A CAUSE OF ACTION IS NOT FINAL AND APPEALABLE

The Appellate Court erred in ruling that an order refusing to strike an attorney is not final and appealable and stated that it was bound by the Supreme Court's rulings in Almon v. American Carloading Corp., (1942), 380 Ill. 524, 530-531, 44 N.E.2d 592, 595; People ex rel. Woll v. Graber (1946), 394 Ill. 362, 369, 66 N.E 2d 750, 754; People ex rel. School District No. 88 v. Holland (1943), 384 Ill. 277, 280; 41 N.E.2d 266, 268, as these rulings in each of these three cases involved an order "expelling" an attorney from appearing in a case. An order expelling an attorney and an order refusing to expel an attorney is entirely different, as in the first instance the cause of the potential trouble for the

Court is eliminated; where in the second instance, the potential trouble is not eliminated and the probability of the Court proceeding to a "tainted" trial is therefore greatly increased.

IV

THE FIFTH DISTRICT APPELLATE COURT OF ILLINOIS ERRED IN NOT TAKING DISCIPLINARY ACTION AGAINST THE BANK'S ATTORNEY

The Appellate Court erred in not taking judicial note of the documents which had been submitted to the trial Court, concerning a complaint, and associated documents, which had been filed with the Attorney Registration and Displinary Commission. The Appellate Court was apparently fully aware of the documents inasmuch as the Court had jurisdiction over the cause for over nineteen (19) months, briefs had been filed, record on appeal filed, and oral arguments had been heard. The Appellate Court was apprised of the

existence of these documents, in the record on appeal, by way of the briefs and the oral argument. Supreme Court Rule 63 B. (3) CANON 3 states:

> A judge having knowledge of a violation of these canons on the part of a judge or a violation of Rule 1-102 of the Code of professional Responsibility on the part of a lawyer shall take or initiate appropriate disciplinary measures.

Also the Appellate Court should have taken judicial note of the fact that the Attorney Registration and Disciplinary Commission documents were submitted to the trial Court for evidentiary purposes "ex parte", and thus taken disciplinary action. Supreme Court Rule 63 A. (4), CANON 3 states:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, shall not permit "ex parte" or other communications concerning a pending or impending proceeding.

documents contained in the Attorney Registration and Displinary Commission file prior to making his decision, thereby denying the disqualification; therefore the documents, which were submitted "ex parte", were entered into evidence without the defendant having an opportunity to object to the exhibit.

By the introduction of the Attorney Registration and Disciplinary Commission file into this cause of action, the attorney, who was the subject of the motion to disqualify and the Attorney Registration and Disciplinary Commission file, in effect became a party to this instant cause of action. Should the Court have made Boatmen's Bank's attorney, a party to this cause of action?

V

FEDERAL COURTS HAVE FOUND ORDER DENYING AN ATTORNEY FROM APPEARING IN A CASE AS FINAL AND APPEALABLE

Federal Appeal Courts have ruled on orders denying an attorney from appearing in a cause of action and have found the orders to be both final and appealable in Silver Chrysler Plymouth, Inc. (1974 CA2 NY), 496 F2d 800; the Court ruled: " that in both a grant or denial of disqualification, the order is collateral to the main proceeding yet has grave consequences to the losing party, and that it is fatuous to suppose that review of the final judgment will provide adequate relief", and "that by holding the order directly appealable it eliminated the uncertainties and the paper work attendant", and "Since the ultimate objective was to bring before an appellate Court an important question which, if unresolved, might well taint a trial", "why shouldn't this question be presented before

needlessly expended". (see 44 ALR Fed 4 (b) Page 720, Appeal of Order to Disqualify). The Court in Greene v. Singer Co. (1971, CA3 NJ) 509 F2d 750, ruled "That to require the defendant appellant to await a final judgment on the merits before testing the legality of the order denying the disqualification might, for practical purposes, deny it the reality of appellate processes", and "If, upon posttrial review, it were held that the safeguards imposed by the District Court were too fragile to protect threatened interests, there could be damage inflicted upon the litigant for which the law would provide no practical remedy; however if the appeal went forward prior to the trial, the possibility of irreparable injury would be substantially lessened". (see 44 ALR Fed. 4 (b) page 720-721.

The Illinois First District Appellate Court in a decision in Chicago Title And Trust Company v. Guaranty Bank, 59

The Illinois First District Appellate Court in a decision in Chicago Title And Trust Company v. Guaranty Bank, 59 Ill.App.3d 362, 16 Ill. Dec. 649, 375 N.E.2d 522, 524; ruled: "Were we writing on a clean slate we would find persuasive the reasoning of Silver Chrysler, quoting at page 805, 806 from Cohen v. Beneficial Industrial Loan Corp. (1949), 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528: "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." The Chicago Title Court stated at 524: "We are persuaded, however that given the proper case our Supreme Court well might reassess it 1942 position in Almon and rule that such decisions and orders are appealable."

Certiorari should be granted for three reasons: First, this Petition presents an issue which was not resolved by the Supreme Court of Illinois, in that the undue delay by the Fifth District Appellate Court in rendering it's ORDER, after having jurisdiction over this instant appeal, violated the right "only" of the Brownings to obtain justice by law, freely, completely, and promptly as guaranteed by Illinois law, the Constitution of Illinois and the Constitution of the United States; and that, that delay violated their right to due process under the Constitution of the State of Illinois and the Constitution of the United States.

Secondly, neither the Fifth District Appellate Court of Illinois nor the Supreme Court of Illinois resolved the issue of "privacy" which is guaranteed to the Brownings by Illinois law, the Constitution

of Illinois and the equal protection under the law of Illinois, and the Constitution of the United States. Nor did either Court decide that the Trial Court had a duty under the law of Illinois to take disciplinary action against Plaintiff's attorney, as well as whether the Appellate Court and the Supreme Court had a like duty to so under the law of Illinois.

Thirdly, the Courts of Illinois have not resolved the issue of the appealability of an order denying a motion to disqualify an attorney; however Federal Courts have found that this issue is of sufficient importance to be immediately appealable.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and order of the Fifth District Appellate Court of Illinois and the orders of the Illinois Supreme Court, and the

duties and obligations of the Courts, in this matter.

Respectfully submitted,

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Attorney for Petitioners
Donald R. Browning and
Nancy C. Browning

If this Honorable Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and the matter be remanded to the Supreme Court of Illinois for determination of these issues.

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DONALD R. BROWNING and
NANCY C. BROWNING, Petitioners

vs.

BOATMEN'S BANK OF BENTON, Respondent

MICHAEL LEWIS BROWNING, individually
and as Trustee; BARBARA JANE WARD;
and MARY SUSAN BENNETT, Defendants

APPENDIX
TO
PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

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IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Case No. 5-90-0219 - Appeal from the Circuit Court of Franklin County No. 88 CH 96

BOATMEN'S BANK OF BENTON, an Illinois Banking Corporation,

Plaintiff-Appellee,

v.

DONALD R. BROWNING, NANCY C. BROWNING, MICHAEL LEWIS BROWNING, Individually and as Trustee, BARBARA JANE WARD and MARY SUSAN BENNETT,

Defendants-Appellants.

ORDER (filed May 25, 1990)

This cause having been heard on motion of plaintiff-appellee, Boatmen's Bank of Benton, to dismiss appeal for lack of jurisdiction, defendants-appellants, Donald R. Browning et al., objection thereto, and the court being advised in the premises:

IT IS THEREFORE ORDERED that appellee's motion to dismiss for lack of a final and appealable order be, and the same hereby is, DENIED. Leckrone v. City of Salem (5th Dist. 1987), 152 Ill.App.3d 126, 503 N.E.2d 1093.

IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Case No. 5-90-0219 - Appeal from the Circuit Court of Franklin County No. 88 CH 96- Honorable Thomas H. Sutton, Presiding.

BOATMEN'S BANK OF BENTON, an Illinois Banking Corporation,

Plaintiff-Appellee,

v.

DONALD R. BROWNING, NANCY C. BROWNING, MICHAEL LEWIS BROWNING, Individually and as Trustee, BARBARA JANE WARD and MARY SUSAN BENNETT,

Defendants-Appellants.

ORDER (filed February 3, 1992)

Defendants, Donald R. Browning and Nancy Browning, appeal the decision of the circuit court of Franklin County denying their motion to disqualify the law firm of Hart & Hart as attorneys for plaintiff, Boatmen's Bank of Benton, an Illinois banking corporation. Defendants Michael Lewis Browning, Barbara Jane Ward and Mary Susan Bennett are not parties to this appeal. In this cause, defendants raise the

issue whether attorney Richard O. Hart's work on behalf of the estate of Maurice L. Campbell presented a conflict of interest with his work on behalf of plaintiff. An order denying a motion to disqualify an attorney is not final and appealable, this court does not have jurisdiction. We therefore dismiss the appeal.

An order "expelling" an attorney from appearing in a case is not final and appealable but collateral to the main issue of the case. (Almon v. American Carloading Corp. (1942), 380 Ill. 524, 530-31, 44 N.E.2d 592, 596; see also People ex rel. Woll v. Graber (1946), 394 Ill. 362, 369, 66 N.E.2d 750, 754; People ex rel. School District No. 88 v. Holland (1943), 384 Ill. 277, 280, 41 N.E.2d 266, 268.) The adoption of Supreme Court Rule 304 (134 Ill.2d R. 304) has no effect on the finality or appealability of such an order, even if the

trial court found no just reason for delay of an appeal. Chicago Title & Trust Co. v. Guaranty Bank & Trust Co. (1987), 59 Ill. App.3d 363, 363-64, 375 N.E.2d 522, 523.

Defendants at oral argument cited Leckrone v. City of Salem (1987), 152 Ill. App.3d 126, 503 N.E.2d 1093, for the proposition that an order denying disqualification of an attorney is final and appealable. We note that Leckrone expressed doubt that such an order is final in terms of Rule 304(a), but Leckrone stated that such an order could be final in the same manner as a contempt order is final and could be reviewed under Rule 301 (134 Ill. 2d R. 301), citing People ex rel. Scott v. Silverstein (1981), 87 Ill.2d 167, 429 N.E.2d 483.

Had the circuit court made a Rule 308(a) (134 Ill.2d R. 308(a)) finding, we might have jurisdiction. Certainly, the

Leckrone analogy between an order disqualifying an attorney and a contempt order would be appropriate. Others have found the analogy appropriate, but were also bound by the supreme court decision. See, e.g. National Wrecking Co. v. Midwest Terminal Corp. (1987), 164 Ill.App.3d 621, 624, 518 N.E.2d 193, 195.

Finally, were we to address the merits of this appeal, we do not believe that attorney Hart accepted employment in matters so closely related to those of his former client as in effect to be a part thereof. (In re Williams (1974), 57 Ill.2d 63, 66, 309 N.E.2d 579, 580-81.) As the court stated, the previous representation was merely a starting point to explain the facts of the case at bar.

For the foregoing reasons, this appeal is dismissed. Appeal dismissed.

GOLDENHERSH, P. J., with RARICK and WELCH, JJ., concurring.

73284

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706

June 3, 1992

Mr. Gary J. Szczeblewski
Attorney at Law
111 E. Franklin Avenue
Sesser, Il. 62884

No. 73284 - Boatmen's Bank of Benton, respondent, v. Donald R Browning et al., petitioners Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1992.

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706

July 7, 1992

Mr. Gary J. Szczeblewski
Attorney at Law
111 E. Franklin Avenue
Sesser, Il 62884

Dear Mr. Szczeblewski,

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 73284 - Boatmen's Bank of Benton, respondent, v. Donald R. Browning et al., petitioners.

The motion by petitioners for leave to file a motion for reconsideration of the order denying the petition for appeal as a matter of right or leave to appeal is denied.

This Court's mandate issued forthwith to the Appellate Court, Fifth District.

UNITED STATES CONSTITUTION - Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION - Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
JAN 22 1993
OFFICE OF THE CLERK

No. 92-1140

In The

Supreme Court of the United States

October Term, 1992

DONALD R. BROWNING and NANCY C. BROWNING,

Petitioners,

v.

BOATMEN'S BANK OF BENTON,

Respondent.

MICHAEL LEWIS BROWNING, individually and as trustee; BARBARA JANE WARD, and MARY SUSAN BENNETT,

Defendants

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

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STATUTE

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STATEMENT OF THE CASE

On December 16, 1988, Boatmen's Bank of Benton ("the Bank") filed a complaint against Donald R. Browning, Nancy C. Browning, and their three adult children, Michael Lewis Browning, Barbara Jane Ward and Mary Susan Bennett ("the Brownings"). (R.13). The complaint sought a declaration setting aside certain fraudulent conveyances between the Brownings and their children. (R.13).

On November 14, 1989, the Brownings filed a Motion to Disqualify Attorney, asking that the Bank's attorney be disqualified from representing the Bank. (R.259). During the eleven-month period between the filing of the complaint and the filing of their Motion to Disqualify Attorneys, the Brownings filed a series of motions to dismiss the complaint, eight discovery depositions were taken, several memoranda of law were filed in opposition to the various motions to dismiss, discovery requests were filed and the Brownings sought and obtained a change of venue from a judge in the case. (R.79 through R.227).

In the Bank's response to the Motion to Disqualify Attorney, the Bank asserted, *inter alia*, that the Brownings had waived their right to request disqualification by failing to raise the issue in a timely manner during the course of the proceedings. (R.263).

On November 20, 1989, during oral arguments on the Motion to Disqualify Attorney, the Brownings asserted that they had not brought the issue of disqualification to the attention of the trial court earlier because they had just recently become aware of the alleged basis for disqualification. (R.771). According to the Brownings, this

new information was the fact that one of the Bank's attorneys had previously represented the Maurice Campbell estate in a probate matter. (R.771).

In response to this assertion, one of the attorneys for the Bank advised the trial court that Nancy Browning, one of the defendants, had made a complaint to the Attorney Registration and Disciplinary Commission against one of the Bank's attorneys shortly after this case was commenced in 1988. (R.786). Counsel for the Bank offered to provide the trial court with copies of letters sent to the Attorney Registration and Disciplinary Commission reflecting the Brownings' prior awareness of the facts on which they based their Motion to Disqualify. At that time, the following discussion took place in open court:

> MR. COX: Your Honor, if the court would like, I would provide the court a copy of the letter that Nancy Browning wrote to the Attorney Disciplinary Commission, last February, about this, and our response to that, if that would be of help to the court.
>
> THE COURT: I don't really think it would be. I am going to take that, that you did that, and the times that you have given me, as being so, rather than delaying this, any longer, unless counsel has some objection that that didn't happen.
>
> MR. SZCZEBLEWSKI: Judge, I am not aware of all that.
>
> THE COURT: Well, submit it then.
>
> MR. HART: Why don't you get him under oath?

> THE COURT: Why don't you go ahead and submit that then, if he is not familiar with it, and, that way, he will know what it is that was submitted. You can do that, say, by the –
>
> MR COX: I can do that today, if you would like.
>
> THE COURT: Why don't you submit those today, and I will give you seven days, if you want to respond just to that.
>
> MR. SZCZEBLEWSKI: Okay.
>
> THE COURT: Anything else?
>
> MR. COX: No, sir. Thank you.
>
> THE COURT: Okay. That will be all, on the record. Off the record. (R.820,821).

The documents discussed above were submitted to the trial court that day without any objection by the Brownings, who made no response whatsoever to those documents. On December 11, 1989, the trial court denied the Motion to Disqualify Attorney by docket entry. (R.4).

On January 2, 1990, the Brownings filed their Motion to Reconsider Motion to Disqualify Attorney. (R.337). On January 8, 1990, the trial court entered a written order denying the Motion to Disqualify. (R.397).

On February 7, 1990, the Brownings filed an Amended Motion to Reconsider Motion to Disqualify Attorney. (R.496). On February 23, 1990, following oral argument, the trial court, by docket entry, denied the Amended Motion to Reconsider Motion to Disqualify Attorney in all respects except as to an issue involving a prior title opinion; the trial court requested affidavits from the parties on this particular issue. (R.8). The trial

court ultimately denied the Brownings' Amended Motion to Reconsider on March 12, 1990. (R.9).

On April 6, 1990, the Brownings filed their Notice of Appeal from the January 8, 1990, order denying their Motion to Disqualify Attorney and from the order entered March 12, 1990, denying their Amended Motion to Reconsider Motion to Disqualify Attorney. (R.732). On February 3, 1992, the appellate court dismissed the appeal for lack of jurisdiction on the basis that orders denying motions to disqualify attorneys are not final and appealable. (A.3).

The Brownings sought leave to appeal to the Illinois Supreme Court, which was denied on June 3, 1992. (A.7). The Brownings then filed a motion asking the Illinois Supreme Court to reconsider its denial of leave to appeal, which motion was denied on July 7, 1992. (A.8).

On December 4, 1992, the Brownings filed their Petition for a Writ of Certiorari with the United States Supreme Court, expressly premising jurisdiction on 28 U.S.C. Section 1257.

SUMMARY OF ARGUMENT

The United States Supreme Court does not have jurisdiction under 28 U.S.C. Section 1257 over the issues raised by the Petitioners in this case. No final judgment or decree has been entered by the Illinois Supreme Court, the Illinois Appellate Court, or the Illinois trial court. The state courts of review have merely refused to exercise jurisdiction over an interlocutory appeal.

Orders denying a motion to disqualify an attorney are not final and appealable under either well-settled Illinois law or analogous federal law.

This case does not involve a properly raised federal question. Petitioners did not raise any federal question below, and the state courts did not rule on any federal question.

ARGUMENT

THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO DECIDE PETITIONERS' CLAIMS

Petitioners purport to invoke jurisdiction under 28 U.S.C. Section 1257. There is no basis for jurisdiction under that section for two main reasons: (1) no final judgment or decree has been entered, and (2) no federal questions were raised or decided below.

The Illinois Courts, including the Illinois Supreme Court and the Illinois Appellate Court have not entered any final judgment or decree in this case. The reviewing Illinois courts have merely refused to hear an interlocutory appeal from the trial court's denial of Petitioners' Motion to Disqualify Attorney on the ground that such denial was not final and appealable, and therefore the reviewing courts lacked jurisdiction. (A.3). Illinois courts have consistently held that such orders are not final and appealable. *Almon v. American Carloading Corporation*, 380 Ill. 524, 44 N.E.2d 592 (1942); *Matsunaga v. Worrell*, 169 Ill. App. 3d 681, 523 N.E.2d 1042 (1st Dist. 1988); *Lieb v.*

Toulin, Inc., 113 Ill. App. 3d 707, 447 N.E.2d 900 (1st Dist. 1983), denying interlocutory appeal of an order refusing to disqualify attorney.

Petitioners argue that certain federal courts have, in the past, found orders regarding disqualification of an attorney to be final and appealable. (Petition at p.29). However, all of the cases cited by Petitioners on this point were decided prior to the decision of the United States Supreme Court in *Firestone Tire & Rubber Company v. Risjord*, 449 U.S. 368 (1981). In *Firestone*, the United States Supreme Court held that a district court order denying a motion to disqualify an attorney in a civil case is not appealable as a final decision under 28 U.S.C. Section 1291. Later, in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), the United States Supreme Court again held that orders disqualifying counsel in civil cases are not immediately appealable. Neither of the foregoing opinions of the United States Supreme Court have been acknowledged or otherwise addressed by Petitioners.

Petitioners will have an opportunity to raise the disqualification issue on appeal to the state courts following the trial of this matter. However, under both well-settled Illinois law and analogous federal law, they have no recognized right to appeal this issue to the United States Supreme Court at this point in the state court litigation.

Further, the instant appeal does not involve a properly raised federal question. Petitioners have failed to specify in their Statement of the Case the stage in the proceedings at which federal questions may have been raised or the manner of raising them. Rule 14.1(h). Unless it appears in the Record that a federal question was

properly raised and decided in the state court below, the United States Supreme Court's appellate jurisdiction fails. *Cardinale v. State of Louisiana*, 394 U.S. 437 (1969).

Petitioners purport to raise two federal questions for the first time in their Petition. First, Petitioners assert that they were somehow denied due process because the Illinois Appellate Court did not dismiss the appeal until it had been pending for nineteen months. (Petition at p.16). The Record reflects that this issue was not raised below. Petitioners cite no authority for the proposition that the timing of the Illinois Appellate Court's dismissal of their appeal for lack of jurisdiction somehow violated their right to due process. Next, Petitioners assert that neither the Illinois Appellate Court nor the Illinois Supreme Court ruled on the issue of the privacy of the Attorney Registration and Disciplinary Commission documents submitted to the trial court. (Petition at p.17). This issue was not ruled on by the state courts below because they recognized that they lacked jurisdiction to consider this question at this point in the proceedings. (A.3). Further, Petitioners completely failed to raise any issue involving their claimed constitutional right to privacy in the proceedings below. They will be given the opportunity to raise their constitutional claims at the appropriate time in the proceedings.

Even if the Petitioners had properly raised these issues below, the United States Supreme Court still has no jurisdiction because these issues have not been passed upon by the courts below. Both the Illinois Appellate Court and the Illinois Supreme Court declined to hear Petitioners' interlocutory appeal on the basis that they lacked jurisdiction because no final and appealable order

had been entered. Although the issues were found to be not yet ripe for appeal, Petitioners will have the opportunity to raise these issues for review at a later time, when a final and appealable order is entered.

As noted by this Court in *Webb. v. Webb*, 451 U.S. 493 (1981), there are strong policy considerations underlying the rule that federal questions raised in a state case be presented first to the state court. Principles of comity in our federal system require that the state courts be offered the opportunity to perform their duties. Also, this rule affords the parties the opportunity to develop the record necessary for adjudicating such issues. Finally, presentation of these questions to state courts may obviate the need for consideration of the case by the United States Supreme Court, thus reducing the workload of this Court.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied for the foregoing reasons.

Respectfully submitted,

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